

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED RESOURCE RECOVERY
CORPORATION,

Plaintiff,

07 Civ. 9452

-against-

OPINION

RAMKO VENTURE MANAGEMENT, INC.
and JOHN KOHUT,

Defendants.

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RAMKO VENTURE MANAGEMENT, INC.,

Third-Party Plaintiff,

-against-

CARLOS GUTIERREZ,

Third-Party Defendant.

-----X

A P P E A R A N C E S:

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and Third-Party Defendant Carlos Gutierrez

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Sweet, D.J.

Plaintiff United Resource Recovery Corporation ("URRC" or the "Plaintiff") and third-party defendant Carlos Gutierrez ("Gutierrez") have moved under Rule 56, Fed. R. Civ. P., to dismiss the counterclaims of defendants Ramko Venture Management, Inc. ("Ramko") and John Kohut ("Kohut") (collectively, the "Defendants") and the third-party complaint of Ramko against Gutierrez. Upon the facts and conclusions set forth below, the URRC motion is granted and the counterclaims and third-party complaint are dismissed.

The resolution of this motion seeking to resolve the dispute between a start-up company, URRC, and Kohut, the sole shareholder and officer of Ramko, over the compensation for services provided by Kohut, turns on whether or not a factual issue is presented with respect to the existence of an understanding between the parties over their six-year relationship to pay Kohut for certain services allegedly provided. While the question is indeed close, the facts as viewed by Defendants do not present a conflict requiring a trial and fail to establish the understanding asserted by Kohut.

I. PRIOR PROCEEDINGS

On February 20, 2007, URRRC filed a declaratory judgment action against Ramko and Kohut, its president, in the United States District Court for the District of South Carolina seeking a declaration that Ramko is not entitled to any fees as demanded in connection with any actual or alleged agreement.

On April 4, 2007, Ramko filed an "Answer and Counterclaim and Third-Party Complaint" against URRRC's principal, Gutierrez, asserting counterclaims for breach of contract, unjust enrichment, quantum meruit, promissory estoppel, and fraud against URRRC and a third-party claim against Gutierrez for promissory estoppel and fraud. Upon motion by Ramko, the District Court of South Carolina transferred the action to the Southern District of New York in October 2007.

In January 2008, URRRC moved to dismiss Ramko's counterclaims and third-party claims pursuant to Fed. R. Civ. P. 12(c). The Court's opinion granting URRRC's motion in part categorized Ramko's counterclaims as seeking

payment for: (1) a break-up fee on the "Founders" deal; (2) work "reflected" in the Past Work Agreement performed from 2001 to May 2005; and (3) investment banking services rendered in 2005. United Res. Recovery Corp. v. Ramko Venture Mgmt., 584 F. Supp. 2d 645, 652 (S.D.N.Y. 2008) (the "October 28 Opinion"). The counterclaims related to the first and third categories were dismissed.

In denying the motion to dismiss Ramko's claims related to "CFO-type" services allegedly provided from 2001 to May 2005, the Court held that, at the pleading stage, Ramko sufficiently stated a claim for breach of an oral contract based upon Ramko's allegations that:

- From 2001 through May 2005, Ramko provided URRRC with "a broad array of financial consulting services, including services of the type that would normally be performed by an in-house CFO." Id. at 655 (citing Answer ¶ 49, 51);
- "Gutierrez promised Kohut repeatedly that Ramko would be 'taken care of.'" Id.; and
- "Ramko was promised, orally and as reflected in the Past Work Agreement [dated January 2, 2004], compensation for the extensive pre-June 2005 services to URRRC" Id. at 656 (citing Answer ¶ 49, 57).

Discovery ended March 30, 2009. The instant motion was heard and marked fully submitted on April 29, 2009.

II. THE FACTS

The facts are set forth in the Plaintiff's and Third-Party Defendant's Statement of Undisputed Material Facts pursuant to Local Civil Rule 56.1, and the Defendants' Response and Statement of Material Disputed Facts, pursuant to Local Civil Rule 56.1. The facts are undisputed except as noted.

URRC is a South Carolina corporation and Gutierrez is its CEO. URRC was formed in 1992 and is involved in the plastic recycling and silver reclamation business and has a patented recycling technology capable of extracting a plastic raw material called "PET" from certain waste products and creating a "super cleaned" FDA approved form of recycled PET.

Ramko, by its sole shareholder and officer, John Kohut, is engaged in the business of providing financial services in New York to help clients raise venture capital.

According to Defendants, Ramko and Kohut at all relevant times also provided strategic guidance and services of a consulting and financial nature.

URRC retained Ramko to help URRC raise private capital to expand its plastic recycling business. Defendants assert that URRC also sought financial and strategic guidance from Ramko, and that Kohut became integrally involved in all aspects of URRC's business apart from the technical side.

The parties signed the first of several successive, written contingent fee agreements, all prepared by Ramko, in March 2001. The March 2001 agreement provided that Ramko would use "best efforts" to secure a \$1.2 million bridge loan for URRC in exchange for a contingent fee of 10% of the loan amount, plus out-of-pocket expenses and stock warrants. See Ex. 1 to the Decl. of Carlos Gutierrez in Supp. of Mot. for Summ. J. Pursuant to Fed. R. Civ. P. 56 ("Gutierrez Decl."). The parties also signed a private placement agreement in April 2001 under which Ramko agreed to try to raise \$3 to \$6 million of equity capital for URRC in exchange for a contingent fee of 10% of the

capital raised, out-of-pocket expenses, and stock warrants. Ramko failed to raise any capital under these agreements.

In August 2001, Ramko and URRRC entered into a revised, private placement agreement under which Ramko agreed to use "best efforts" to raise \$2 million in equity capital for URRRC. Gutierrez Decl. Ex. 4. As previously provided, Ramko would receive 10% of the capital raised, plus expenses and warrants, if and when Ramko succeeded in raising capital. Ramko failed to raise any capital under this agreement.

The parties signed additional private placement agreements in March 2002 and November 2002 that superseded the prior agreements. Under the 2002 agreements, Ramko attempted to raise \$2 million and \$6 million for URRRC, respectively, for a percentage based contingent fee and warrants. Ramko failed to raise any capital under these agreements.

The parties signed another written agreement in January 2004. Pursuant to that agreement, Ramko undertook to raise \$16 million in equity capital, in two tranches of \$8 million each, for URRRC in exchange for the same

percentage based contingent fee and warrants as in past agreements. URRRC also agreed pursuant to a separate "side letter" dated January 2, 2004, to pay Ramko additional warrants for "past work" conditioned upon the private placement closing. Gutierrez Decl. Ex. 8. Ramko did not raise any capital under the January 2004 agreement.

In addition to the terms referenced above, all of the agreements signed from 2001 to 2004, except the March 2001 agreement, stated that if and when Ramko raised the capital, URRRC and an affiliate of Ramko would enter into a financial advisory agreement for prospective consulting services at the rate of \$8,500 per month. Ramko also attached a sample form financial advisory agreement to the March 2002, November 2002, and January 2004 agreements which Defendants assert Ramko expected to be used as a template for a post-closing financial advisory agreement for future consulting services, if and when Ramko raised the capital. The sample agreement provided that for a monthly fee Ramko would perform services "similar to those performed by the principal financial officer." Gutierrez Decl. Exhs. 5-8.

Although Ramko did not raise the capital URRC sought under any of the written contingent fee agreements from March 2001 to May 2004, Ramko did arrange for an investment by Founders Equity SBIC, LLP ("Founders") which URRC elected not to accept.

In connection with its efforts to promote URRC and raise capital, Ramko, by Kohut, became knowledgeable about URRC's business, its ongoing financial condition and future business prospects. Ramko agreed to earn a fee only if it raised capital under the contingent fee agreements based on Kohut's belief in URRC's recycling technology and his expectation that Ramko would be able to raise the necessary capital. In addition, Defendants assert that Kohut was repeatedly assured that Ramko would be taken care of with respect to its pre-June 2005 work beyond capital-raising whenever, and however, URRC raised money. Subsequent to the termination of the parties' business relationship, URRC entered into an agreement with Coca-Cola for the construction of a recycling facility.

In May 2005, URRC and Ramko entered into a flat-fee consulting agreement that Kohut had prepared ("May 2005 Agreement"). The terms of the May 2005 Agreement were

largely extracted from the form financial advisory agreement that Ramko had repeatedly attached and sent with the prior fee agreements. Like that form agreement, the May 2005 Agreement stated that Ramko would provide prospective services "similar to those performed by a principal financial officer" for a prospective monthly fee (i.e., \$8,500). Gutierrez Decl. Ex. 10. The May 2005 Agreement did not provide for any retroactive payments for past work.

From June 2005 to May 2007, URRRC paid Ramko, on a monthly basis, a total of approximately \$204,000 in financial advisory fees. The services that Ramko performed prior to June 2005 were substantially similar to those it performed after June 1, 2005. URRRC terminated the May 2005 Agreement with Ramko in 2007.

Defendants have asserted in their remaining counterclaims that they should be paid for pre-June 2005 "CFO-type" services Ramko allegedly provided to URRRC, including consulting on virtually all aspects of URRRC's business. According to Kohut, Gutierrez indicated that he would pay Ramko the substantial equivalent of, or conceivably more than, the \$8,500 per month that had been

discussed as Ramko's fee for its various pre-June 2005 services, but which URRRC did not have the then-current financial ability to pay.

According to Defendants, Kohut's expectation of compensation was explicitly or implicitly present in all of the discussions involving Gutierrez's repeated assurances to Kohut that he would be "taken care of." See, e.g., Defs.' Mem. of P. & A. in Opp'n. ("Opp. Mem.") at 9.

Although Ramko never issued URRRC a bill for any alleged "CFO-type" services, Ramko frequently did business on a handshake.

In an email of May 21, 2005, Gutierrez wrote Kohut stating "If you are still with me . . . let do it . . . but to be fair . . . we may have to do it differently . . . my conscious is hurting me . . ." Ex. E to Affirm. of Lloyd S. Clareman in Opp'n to Pl.'s & Third-Party Def.'s Mot. for Summ. J.

III. DISCUSSION

A. The Summary Judgment Standard

Summary judgment is granted only where there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); SCS Commc'ns, Inc. v. Herrick Co., 360 F.3d 329, 338 (2d Cir. 2004). The courts do not try issues of fact on a motion for summary judgment, but, rather, determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986).

"The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and that the undisputed facts establish [its] right to judgment as a matter of law." Rodriguez v. City of New York, 72 F.3d 1051, 1060-61 (2d Cir. 1995). In determining whether a genuine issue of material fact exists, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Gibbs-Alfano v. Burton, 281 F.3d 12, 18

(2d Cir. 2002). However, "the non-moving party may not rely simply on conclusory allegations or speculation to avoid summary judgment, but instead must offer evidence to show that its version of the events is not wholly fanciful." Morris v. Lindau, 196 F.3d 102, 109 (2d Cir. 1999) (internal quotes omitted). Summary judgment is appropriate where the moving party has shown that "little or no evidence may be found in support of the nonmoving party's case. When no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper." Gallo v. Prudential Residential Servs., L.P., 22 F.3d 1219, 1223-24 (2d Cir. 1994) (citations omitted).

The following facts are claimed by the Defendants to have been established during discovery:

- Gutierrez repeatedly promised Kohut that Ramko would be "taken care of" with respect to payment for its pre-June 2005 services.
- Ramko expected to be paid for these services.
- The valuation of Ramko's services at \$8,500 per month throughout the period prior to June 1, 2005, was reasonable.

- The services Ramko performed prior to June 2005 were substantially similar to those it performed after June 1, 2005.
- Ramko provided "ongoing strategic direction and oversight" to URRRC.
- Ramko acted as URRRC's "regularly employed" "financial services" professional and was essentially on call and available to URRRC during the period prior to June 2005.
- Gutierrez's "conscience was hurting [him]" in May 2005.
- Ramko's services were as valuable as Gutierrez suggested they were when he proposed making Kohut the swing vote on URRRC's Board of Directors, and wrote approvingly to Founders of the "dedication" Kohut had shown to URRRC as well as of the knowledge of the company and the marketplace that Kohut had displayed over the years.

Opp. Mem. at 14-15.

Accepting these facts as undisputed for summary judgment purposes, the question is presented whether or not as a matter of law an enforceable counterclaim and third-party complaint has been stated.

B. The Verbal Contract Claim is Dismissed

To form a contract there must be an objective meeting of the minds and a manifestation of mutual assent “sufficiently definite to assure that the parties are truly in agreement with respect to all material terms.” Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc., 487 F.3d 89, 95 (2d Cir. 2007) (quoting Express Indus. & Terminal Corp. v. N.Y. State Dep’t of Transp., 93 N.Y.2d 584, 589 (1999)); Missigman v. USI Northeast, Inc., 131 F. Supp. 2d 495, 506 (S.D.N.Y. 2001) (“If an agreement is not reasonably certain in its materials terms, there can be no legally enforceable contract.”). “[A] mere agreement to agree, in which a material term is left for future negotiations, is unenforceable.” Tractebel Energy Mktg., 487 F.3d at 95. Price and compensation are examples of material terms that require definiteness. Major League Baseball Props., Inc. v. Opening Day Prods., Inc., 385 F. Supp. 2d 256, 271 (S.D.N.Y. 2005). In addition, a party’s subjective belief as to what was agreed to or intended is not controlling. Rosoff v. Mountain Laurel Ctr. for the Performing Arts, 317 F. Supp. 2d 493, 499 (S.D.N.Y. 2004) (finding “statements of belief or understanding are immaterial in view of the well established principle that the controlling intention is that which is discerned from

the parties' objective manifestation of agreement, not subjective, uncommunicated intentions or beliefs").

Defendants' claim for breach of contract is based on the alleged existence of an oral contract in which URRRC agreed to pay Ramko \$8,500 per month for pre-June 2005 "CFO-type" services. Defendants' assertion that such an oral contract exists relies heavily on Gutierrez's statements between 2001 and June 2005 that Ramko would be "taken care of." Opp. Mem. at 9, 17. Defendants also assert that Gutierrez "indicated" to Kohut at some point that "he would pay Ramko the substantial equivalent, or conceivably more, than the amount of \$8,5000 per month" for ongoing "CFO-type" services. Defendants' Response to Plaintiff's and Third-Party Defendant's Statement of Undisputed Material Facts, and Statement of Material disputed Facts, Pursuant to Local Civil Rule 56.1, ¶ 20.

Defendants' assertion that Gutierrez specified the amount of compensation to be paid Ramko for the pre-June 2005 "CFO-type" services is belied by Kohut's deposition testimony, including the portions cited by Defendants. During his deposition, Kohut repeatedly testified that Gutierrez's assurances that Kohut would be

compensated for "CFO-type" services were "undefined" and that Gutierrez never specified the form or amount of compensation:

Q. Did Mr. Gutierrez ever say to you that he will take care of you for the sum of \$8,500 per month?

A. No.

Kohut Tr. 62:9-13.

A. . . . I was told I would be taken care of. Quite frankly, I expected to be taken care of for more than \$8,500.

* * *

Q. But Mr. Gutierrez never said to you that you'll be paid a specific sum correct?

A. We never talked a sum. Like I said, my expectation was higher than \$8,500.

Kohut Tr. 62:18-20; 63:20-23.

A. . . . And to be honest with you, the translation of "I would be taken care of," probably could have been in stock, could have been in warrants, could have been ownership of the company, cash, whatever.

Kohut Tr. 61:8-13.

A. . . . Multiple times a day, he [Gutierrez] would say that he would take care of me. It was undefined from that standpoint - it might be

equity he chose to give - they gave Gerry equity. To the extent that I recognized that he appreciated the expertise I brought to the company . . . but I had no reason to doubt he was good for it, and if he had said, hey, it would be x percent of the company and if I thought that wasn't fair compensation for financing with him for six years, I would have felt very comfortable to say, that really isn't fair compensation for everything I have done.

Kohut Tr. 185:24-186:18.

Taken alone, Gutierrez's vague and ambiguous statement that Kohut would be "taken care of" is too indefinite to form a legally enforceable contract. Major League Baseball Props., 385 F. Supp. 2d at 271-72 (finding statement "we'll compensate you" too indefinite to establish a meeting of the minds between the parties); Harkavy v. Apparel Indus., Inc., No. 73 Civ. 4764 (DBD), 1974 WL 395, at *3, (S.D.N.Y. Apr. 25, 1974) (finding defendant's statements to plaintiff that "[y]ou won't be forgotten about a stock option" and "I will take care of you when all plans are finished" were too indefinite to create an enforceable contract); Glanzer v. Keilin & Bloom LLC, 722 N.Y.S.2d 540, 541 (App. Div. 2001) (finding promise to pay plaintiff "substantial income," "market rate," and "equity interest" was too indefinite to support claim for breach of contract). As this court has

previously held, "[o]ral assurances . . . cannot of themselves give rise to a triable question of fact as to the existence of a contractual relationship." Deluca v. Bank of Tokyo-Mitsubishi UFJ, Ltd., No. 06 Civ. 5474 (JGK), 2008 WL 857492, at *15 (S.D.N.Y. Mar. 31, 2008) (quoting Albert v. Loksen, 239 F.3d 256, 264 (2d Cir. 2001)).

Ramko has also argued that URRC's oral promise is corroborated by written evidence. In support of this contention, Ramko cites the April 20, 2001 contingent fee agreement as evidence that the parties had an oral contract contemplating that Ramko and Kohut would be compensated for "CFO-type" services at \$8500/month for the period prior to June 2005. The cited April 2001 agreement's terms state, in relevant part, that:

[T]o the extent the Company accepts Private Placement Funds arranged by Ramko . . . as compensation for its active participation in the on-going strategic direction and oversight of the Company's activities, the Company shall enter into a financial advisory agreement with an affiliate of Ramko for a term of five years or as long as a representative of Ramko remains on the Company's Board of Directors. The terms of this agreement shall include a monthly advisory fee of \$8,500 plus reasonable out of pocket expense.

Gutierrez Decl. Ex. 2. Ramko has contended that this clause proves that when the parties signed the April 2001 fee agreement, they contemplated that URRRC would pay Ramko \$8,5000 per month for CFO-type services, retroactively, after URRRC raised money, with or without Ramko's assistance. However, the April 2001 contract indicates only that the parties expected to enter into a financial advisory agreement for prospective fees at the rate of \$8,500 per month if and when Ramko arranged financing. The contract therefore fails to corroborate Defendants' contention that there existed an oral contract specifying payment terms for "CFO-type" services during the period prior to June 2005. Similarly, the language of the parties' numerous contingent fee agreements contradicts Kohut's position (i.e., the fee provision in all of the contracts stated that the parties would sign a financial advisory agreement for a flat fee only after Ramko raised the private capital URRRC sought).

Defendants also rely upon Kohut's deposition statement that he became "involved in everything" as an indication that there existed an oral contract between the parties. See, e.g., Opp. Mem. at 2, 6. That Kohut chose to learn about URRRC's business does not establish that URRRC

ever agreed to pay him any fees or compensation beyond what was agreed to in writing, or that URRRC ever did anything that manifested an intent to pay URRRC anything beyond what was contained in the contingent fee agreements.

Similarly, Ramko has cited excerpts from URRRC's Business Plans from 2002 to 2005, which identify Ramko as a provider of "financial services"; one email from Gerry Fishbeck (URRC's Vice President) to a business prospect characterizing Kohut's role with URRRC as "Board Member/Financial"; and one email dated May 21, 2005 from Gutierrez to Kohut stating "[i]f you are still with me . . . let do it . . . but to be fair . . . we may have to do it differently . . . my conscious is hurting me . . ." See, e.g., id. at 4, 5, 11. These statements, however, also do not establish that URRRC agreed to separately pay Ramko anything beyond the parties' written fee agreements. Ramko has produced no evidence that the parties orally agreed to any compensation for "past work" beyond what was contained in the written Past Work Agreement signed in May 2005.

Furthermore, Kohut testified during his deposition that he never shared with Gutierrez his belief or expectation that Ramko would be paid for pre-May 2005

"CFO-type" services separate and apart from its fee for capital raising efforts. Gutierrez Decl. Ex. 16, at 172:19 to 174:2. In addition, Kohut testified that he could not recall ever having shared with Gutierrez the distinction that he now seeks to draw between his "capital-raising" activities and his "CFO-type" activities. Id. Rather, Kohut testified only to his subjective belief that he would be paid for the activities he viewed as distinct from his "capital-raising" obligations.

On the facts presented, no basis exists for a reasonable finder of fact to conclude that a meeting of the minds occurred such that an enforceable contract sprung into existence with respect to compensation for Ramko's pre-June 2005 "CFO-type" activities.

C. The Quasi Contract Claims Are Dismissed

Ramko has alleged the quasi contract theories of quantum meruit and unjust enrichment to recover compensation from URRC for alleged pre-May 2005 "CFO-type" services. To recover in quantum meruit, a party must establish "(1) the performance of the services in good faith, (2) the acceptance of the services by the person to

whom they are rendered, (3) an expectation of compensation therefore, and (4) the reasonable value of the services.” LeBoeuf, Lamb, Greene & MacRae, L.L.P. v. Worsham, 185 F.3d 61, 66 (2d Cir. 1999) (quoting Martin H. Bauman Assocs., Inc. v. H&M Int’l Transp., Inc., 567 N.Y.S.2d 404, 408 (App. Div. 1991)). As this Court has previously held, courts may “analyze quantum meruit and unjust enrichment together as a single quasi contract claim.” United Res. Recovery Corp., 584 F. Supp. 2d at 658 (quoting Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp., 418 F.3d 168, 175 (2d Cir. 2005)).

The facts asserted by Ramko fail to establish that it had a reasonable expectation to be compensated for its alleged pre-May 2005 “CFO-type” services. See GMD Shipyard Corp. v. Dermaga Shipping, No. 03 Civ. 2748 (RWS), 2004 WL 2251670, at *7 (S.D.N.Y. Oct. 6, 2004) (dismissing quantum meruit claim for lack of a “reasonable expectation of compensation”).

The parties’ six-year business relationship was defined by a series of written contingent and non-contingent fee agreements that set forth in detail the relationship between URRC and Ramko. Significantly, issues

of compensation were always addressed with specificity in those agreements. For instance, from 2001 to January 2004, all of the parties' contingent fee agreements specified that Ramko would be paid a particular percentage amount of the capital to be raised, a specific sum to cover Ramko's expenses, and a specific number of warrants. The January 2004 Past Work Agreement was similarly specific down to the number of stock warrants that Ramko would receive if it raised private capital. The May 2005 Agreement, which set forth compensation for "CFO-type" services even in the absence of capital funding, also specified a monthly advisory fee. Even the sample financial advisory agreement for prospective "CFO-type" services that Ramko attached to the March 2002 to January 2004 contingent fee agreements and hoped the parties would sign post-closing contained explicit compensation clauses.

Moreover, as Kohut's deposition testimony makes clear, Ramko never shared with URRRC its belief that it would be paid separately for pre-closing "CFO-type" services. See, e.g., Muller Boat Works, Inc. v. Unnamed 52' House Barge, 464 F. Supp. 2d 127, 142 (E.D.N.Y. 2006) (noting plaintiff evidenced his expectation to be compensated by providing an estimate for his work and

issuing an invoice). New York courts have held that quantum meruit claims fail where a party cannot reasonably know that services are being performed by the other party with the expectation that additional payment will be made for those services. In Freedman v. Pearlman, 706 N.Y.S.2d 405 (App. Div. 2000), the plaintiff claimed that he performed numerous financial services for the defendant and accepted below market value compensation because the defendant made oral representations that the plaintiff would be "fairly compensated." Id. at 406-07. Plaintiff sought to recover in quantum meruit. The First Department upheld the dismissal of plaintiff's claim, ruling that:

[Plaintiff's] allegation that he performed services far greater than defendants deserved for the compensation he actually received are not sufficient to state a cause of action in quantum meruit where none of the services allegedly performed are "so distinct from the duties of his employment and of such nature that it would be unreasonable for the employer to assume that they were rendered without expectation of further pay."

Id. at 408 (quoting Robinson v. Munn, 238 N.Y. 40, 43 (1924)); see also Cannon v. First Nat'l Bank of East Islip, 469 N.Y.S.2d 101, 103 (App. Div. 1983) ("Where a person renders services over a long period of time at a fixed rate

and is regularly paid, the presumption is that the amount paid was inclusive of all services" (citations omitted)).

Based on Kohut's testimony, it is clear that he fully expected to raise the private capital, earn a sizeable fee, and continue on with URRC in a long term capacity. However, Ramko cannot now recover compensation that it never contracted for because Kohut's plans with URRC did not work out as he hoped. See, e.g., Landcom, Inc. v. Galen-Lyons Joint Landfill Comm'n, 687 N.Y.S.2d 841 (App. Div. 1999). In Landcom, the court found that Landcom had prepared a landfill construction application and incurred expenses with the expectation that it would eventually operate a new landfill facility. Id. at 842-43. When the facility failed to materialize, Landcom sought damages from the defendant under the theory of quantum meruit. In dismissing Landcom's claim on summary judgment, the court found no expectation to compensation, stating that "[a]llthough it may seem harsh to deny Landcom payment for services rendered at the request of the municipal officials, Landcom . . . undertook the work at its own risk." Id. at 843 (quoting Gill, Korff & Assoc. v. County of Onondaga, 544 N.Y.S.2d 393, 395 (App. Div. 1989)).

Given the parties' consistent practice of detailing their business relationship in writing, URRC's justified expectation that any "CFO-type" services provided by Ramko were part of the parties' contingent fee agreement, and Ramko's admitted failure to communicate its contrary expectation to URRC, Ramko's expectation that it would be compensated for its "CFO-type" services cannot be viewed as reasonable.

D. The Promissory Estoppel Claims Are Dismissed

To establish promissory estoppel, a party must show "a clear and unambiguous promise; a reasonable and foreseeable reliance by the party to whom the promise is made; and an injury sustained by the party asserting the estoppel by reason of his reliance." Reprosystem, B.V. v. SCM Corp., 727 F.2d 257, 264 (2d Cir. 1984) (citation omitted). Gutierrez's statement that Ramko would be "taken care of" was far from a "clear and unambiguous" promise necessary to sustain Defendants' promissory estoppel claim. See, e.g., Brinsights, LLC v. Charming Shoppes of Delaware, Inc., No. 06 Civ. 1745 (CM), 2008 WL 216969, at *5 (S.D.N.Y. Jan. 16, 2008) (finding that even in conjunction

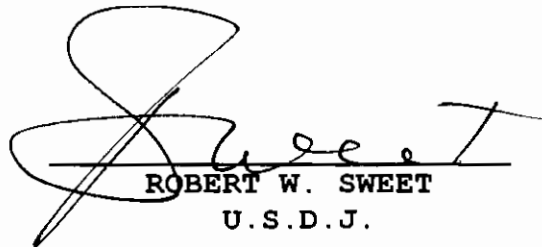
with other statements, assurance that "the contract will be taken care of," did not constitute clear and unambiguous promise); Jaffe v. Aetna Cas. & Sur. Co., No. 93 Civ. 0385 (SAS), 1996 WL 337268, at *3 (S.D.N.Y. June 19, 1996) (finding employer's generalized statements, including that employee would be "well taken care of" if he did his job constituted only "vague assurances").

IV. CONCLUSION

For the foregoing reasons, the motion for summary judgment is granted and the remaining counterclaims and third-party claims against URRC and Gutierrez are dismissed.

It is so ordered.

New York, NY
August 25, 2009



ROBERT W. SWEET
U.S.D.J.